



Department of Defense INSTRUCTION

January 24, 1991
NUMBER 5400.10

ASD(PA)

SUBJECT : *OSD Implementation of DoD "Freedom of Information Act"*
(FOIA) Program

- References:
- (a) DoD Instruction 5400.10, "OSD Implementation of DoD Freedom of Information Act Program, " August 20, 1981 (~~hereby~~ canceled)
 - (b) DoD Directive 5400.7, "DoD Freedom of Information Act Program, " May 13, 1988
 - (c) DoD 5400 .7-R, "DoD Freedom of Information Act Program, " October 1990, authorized by DoD Directive 5400.7, May 13, 1988
 - (d) Title 5, United States Code, Section 552, "Freedom of Information Act (FOIA) , " as amended
 - (e) through (g) , see enclosure 1

A. REISSUANCE AND PURPOSE

This Instruction reissues reference (a) , and implements references (b) and (c) **by** establishing policy, assigning **responsibilities**, and prescribing procedures *for the effective administration* of the DoD FOIA (reference (d)) Program in the Office of the Secretary of Defense and by the Chairman, Joint Chiefs of Staff and Joint Staff, under reference (d) .

B. APPLICABILITY

This Instruction applies to the Office of the Secretary of Defense (OSD) ; *the Chairman, Joint Chiefs of Staff and Joint Staff*; the Unified Commands; other activities assigned to the OSD for administrative support (hereafter referred to collectively as "OSD Components") ; and to OSD Components' field activities, when designated **by** the Assistant Secretary of Defense (Public Affairs) (ASD (PA)) in concurrence with the **Head** of the **OSD Component** involved. " , **The** term "DoD Components, " as stated herein, refers to the Military Departments and separate Defense Agencies, as in reference (c) .

c. POLICY

It is DoD policy to:

1. Promote public trust by making the maximal amount of information available to the public on the operation and activities of the Department of Defense, consistent with DoD responsibility to ensure national security.

2. Make available to the public the unclassified information, documents, and forms previously provided to the public as part of the DoD service.

3. Answer promptly all FOIA (reference (d)) requests for information and records under established procedures and practices.

4. Place the authority to deny FOIA initial record requests with the Heads of OSD Components.

5. Maintain, publish, and make available for inspection current indices in the public reading room, Room 2C757, Pentagon. Fees shall not be charged for any inspection of those materials. Fees may be charged, in accordance with DoD 5400.7-R, chapter VI, (reference (c)), for furnishing copies of such materials.

6. Release records to the public unless the records are exempt from mandatory disclosure, as outlined in chapter III of reference (c) .

D. RESPONSIBILITIES

1. The Assistant Secretary of Defense (Public Affairs) (ASD (PA)) shall:

a. Direct and administer the DoD FOIA Program within the OSD . The **ASD (PA)** shall designate the Director, Freedom of Information and Security Review (**DFOISR**), as the office of record and point of contact (**POC**) for the OSD Components in matters pertaining to the DoD **FOIA** (reference (d)) Program.

b. Establish policies and procedures to ensure **compliance** with and implementation of DoD Directive 5400.7 (reference •(b)) and reference (c) .

c. Serve as the central POC within the OSD for the receipt of all FOIA (reference (d)) initial requests for records of the OSD Components, except the Unified Commands and the OSD Components designated by the **ASD (PA)** .

d. Forward **FOIA** requests for records from the public to the OSD Component having responsibility for the requested record, and maintain a staff action control system to ensure that action is taken within the time limit established in DoD 5400.7-R (reference (c)) .

e. Prepare responses to requesters from input provided by the OSD Components and collect for deposit with the Director of Administration and Management, Office of the Secretary of Defense (**DA&M, OSD**), assessable fees in accordance with reference (c) .

f. Establish a reading room where the public may inspect and copy available records.

g. Perform the duty of appellate authority for appeals that are submitted as a result of initial denials by the OSD Components for records and fee assessments.

h. Maintain a data base on FOIA activities in a format that meets the requirements of chapter VII of reference (c) and in a manner that affords rapid retrieval.

i. Authorize the Unified Commands and specific field activities of an OSD Component to receive, process, grant, deny, collect, and deposit assessable fees for FOIA requests for records for which those Unified Commands and field activities have primary responsibility. All authorizations by the **ASD (PA)** shall be coordinated with the Head of the OSD Component concerned.

j. ~~Develop~~ and submit the "DoD Annual Report to Congress" **as required by** reference (d) .

k. Conduct educational training for the OSD Components on the requirements and implementation of the **FOIA**.

2. The General Counsel of the Department of Defense (GC, DoD) shall:

a. Provide assistance and advice to the OSD Components in the processing of initial denials of OSD records.

b. Provide assistance and advice to the **ASD (PA)** in the discharge of appellate responsibilities.

c. Coordinate with the Department of Justice (DoJ) on all final appeals for requests records when litigation is likely.

3. The Director of Administration and Management, Office of the Secretary of Defense (DA&M, OSD), shall:

a. Maintain, publish, and make available for public inspection current OSD Component indices of materials, as required by paragraph (a) (2) of 5 U.S.C. 552 (reference (d)) .

b. Coordinate and arrange for information affecting the public, under the FOIA (reference (d)) to be published in the "Federal Register."

c. Receive and deposit in the U.S. Treasury fees collected under the FOIA by the DFOISR.

4. The Heads of OSD Components shall:

a. Process FOIA requests received from the DFOISR in accordance with this Instruction and DoD 5400.7-R (reference (c)) -

b. Designate initial denial authorities (IDAs) who are authorized to deny initial requests for records under the FOIA, and designate an office as the POC for FOIA matters. Provide written notice to the DFOISR of those IDAs and POCs, including notice of changes. The IDA shall be the Head of the OSD Component, or a delegated representative authorized to deny information on their behalf.

c. Provide the DFOISR TWO copies of all OSD records approved for release. Records that originated outside of the OSD that are in the possession of an OSD Component and that are responsive to a request shall also be forwarded to the DFOISR in TWO copies, so the records may be referred to the originating office or Agency for a final release determination. When there is a significant DoD interest in the non-OSD originated records, they shall be reviewed and staffed, and a recommended DoD release determination provided with the records to the DFOISR.

d. Coordinate with other OSD and DoD Components who have a significant interest in a requested record **before** making a final decision on its releasability. In order to adhere to the

time requirements of the FOIA (reference (d)), coordination with Agencies outside the Department of Defense that have a significant interest in the requested records shall be accomplished with action officers having the subject matter expertise. If such

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coordination cannot be accomplished, then the DFOISR shall coordinate with external Agencies. The DFOISR shall effect all coordination with the National Security Council.

e. Coordinate with the Office of the Assistant GC, DoD (OAGC, DoD), from which it normally receives legal advice on proposed denials of records.

f. Provide the DFOISR with a justification for the denial, in whole or in part, of a request for records and identify the specific exemption(s) claimed.

✓ g. Refer cases to the DFOISR for review and evaluation when the issues raised are of unusual significance, precedent setting, or otherwise require special guidance from the DoD FOIA program manager.

h. Refer all FOIA requests and appeals that are received directly from the requester to the DFOISR, who shall enter the request into the OSD formal control system and return the request or appeal for appropriate action.

i. Provide the DFOISR with a copy of a denied record at the time an appeal has been forwarded for OSD Component review. The information recommended for denial shall be bracketed in black pencil.

j. Establish procedures to mark record copies and to notify holders of classified records that have been downgraded, declassified, or reclassified as a result of a review under the FOIA.

k. Provide instructions to employees who administer FOIA matters under this Instruction, DoD Directive 5400.7, and DoD 5400.7-R (references (b) and (c)).

l. Provide to the DA&M, OSD, quarterly updates for the index of final opinions, statements of policy, and administrative staff manuals **and instructions** that affect the public (DoD 5025.1-1, part V, reference (e)). Forward updates no later than 15 days before the end of each calendar quarter to:

- OSD Records Administrator
Washington Headquarters Services
Room 5C315, Pentagon
Washington, DC 20301-1400

E. PROCEDURES

1. General. A request for a record under the FOIA (reference (d)) may be denied only on the determination that:

a. The requested record is exempt under the FOIA. (See DoD 5400.7-R, paragraph 1-504 and chapter 111 (reference (c) .)

b. The requester has failed to comply with the procedural requirements imposed by paragraph 5-100 of reference (c) .

2. Processing FOIA Cases Within the OSD

a. The DFOISR of the Office of the ASD (PA) (OASD (PA)) is the office of record and POC for OSD Components in matters pertaining to the DoD FOIA Program.

b. The DFOISR shall deliver a FOIA request to the OSD Component having responsibility for the requested record. Any FOIA request received by an OSD Component from a source other than the DFOISR shall be directed to the DFOISR without delay for formal entry into the FOIA control system. The OSD Component should commence work on the request, pending its return from the DFOISR.

c. A FOIA request shall be sent by the DFOISR to the OSD Component having responsibility for the records, along with SD Form 466, "Freedom of Information Action (Cover Sheet)"; SD Form 472, "Request Information Sheet"; DD Form 2086, "Record of Freedom of Information (FOI) Processing Cost"; and DD Form 2086-1, "Record of Freedom of Information (FOI) Processing Cost for Technical Data" (if appropriate) . The SD Form 472, the DD Form 2086, and the DD Form 2086-1 (if appropriate) shall be completed and returned to the DFOISR with the documents located as a result of the search. Do not forward information denied in total at the initial request stage. If an appeal should result, information denied in total shall be forwarded to the DFOISR for appellate review. Instructions for information denied in part are in paragraph E.2.g, below. The OSD Components are reminded that their responsibility for document searches also extends to the Federal Records Center, Suitland, MD, if the documents have been retired to that center under AI 15 (reference (f)) .

d. A FOIA request forwarded to an OSD Component by the DFOISR may not be declined, except when responsibility of the records sought is challenged. When possible, the OSD Component should identify on the SD Form 472 the specific OSD Component,

DoD Component, or other Government **Agency** that has responsibility for the record. A lack of specificity by the requester that suggests records of other DoD Components or Agencies may also fit the broad category of the request is not sufficient cause to challenge responsibility.

e. The **DFOISR** shall assign a suspense to each request dispatched to the OSD Components. The suspense shall be met by a decision to grant the request, in whole or in part, or a decision to fully deny the request, or by a petition from the OSD Component's IDA stating the specific number of additional days required and the reasons. Requests for extensions shall be made to the **DFOISR** at least 3 working days before the suspense date. 'Extensions of time shall be granted on a case-by-case basis depending on the reasons that may justify "unusual circumstances." Extensions may not exceed 5 working days, unless it has been determined that the records are located outside the immediate area of the organization receiving the FOIA (reference (d)) request for action.

f. When a request is granted, TWO copies of the requested record, a completed SD Form 472, DD Form 2086, and DD Form 2086-1 (if appropriate) shall be delivered to the **DFOISR**, Room 2C757, Pentagon. When a copy of the record cannot be made available by the suspense date, the delay shall be explained on the SD Form 472 and a date established as to the record's availability.

g. When a request is denied in part, two excised copies of the **requested** record shall be delivered to the **DFOISR**. The excised copies shall clearly reflect the denied information by means of BLACKENED areas, which are SUFFICIENTLY BLACKENED as to reveal no information. The best means to ensure illegibility is to cut out the information from a copy of the document and **reproduce** the appropriate pages. If the document is classified, **all** classification markings shall be lined through with a single black line, which still allows the marking to be read. The document shall then be stamped "Unclassified." OSD Components are reminded that the FOIA requires release of **segregable** information not otherwise exempt. Minimally, review for **segregability** shall be at the paragraph level. Completed copies of the SD Form 472, DD Form 2086, and DD **Form 2086-1** (if appropriate) shall be **●** returned with the packet. When the **denial is** based on a security classification **according** to the criteria in DoD 5200.1-R (reference (g)), the explanation shall indicate that a current review of the record supports continued classification. That explanation shall also contain specific rationale that supports the decision for continued classification of the requested record. All denials of information require the coordination of the OSD

Component's General Counsel (GC), and the signature of the IDA on the SD Form 472.

h. When a requested record is denied in its entirety under one or more of the exemptions in the FOIA (reference (d)), as in DoD 5400.7-R, chapter III (reference (c)), the procedures in paragraph **E.2.g., above**, apply, except that a copy of the requested record is not provided to the DFOISR, and the explanation on the SD Form 472 shall state that it is not possible to segregate portions of the record. A classified document containing unclassified information may not be denied in total under exemption one of the **FOIA**, **UNLESS** the unclassified information, when taken in **aggregate**, would reveal classified information (see paragraph 3-200, number 1, reference (c)) . Denial of **unclassified** information not meeting that standard may only be accomplished by exerting one or more of exemptions two through nine of the FOIA.

i. When an OSD Component cannot locate a requested record and a "no record" determination is made, the explanation on the SD Form 472 shall so state and be signed by the IDA. Complete copies of the SD Form 472 and DD Form 2086, or DD Form 2086-1 (if appropriate) shall be returned with the packet.

j. Any case referred to the **DFOISR**, in accordance with paragraph **D.4.g., above**, shall be transmitted by memorandum and signed by the IDA, who establishes the unusual circumstances, precedent-setting conditions, or other circumstances **necessitating** the special attention or guidance of the DoD FOIA program manager. Unless the OSD Component is notified to the contrary, **DFOISR** review or evaluation action does not relieve the OSD Component of the responsibility of reaching an initial decision on the request within the established suspense date. **DFOISR** action shall be accomplished to provide timely guidance or recommendation.

k. The OSD Components shall coordinate directly with the FOIA POC or action officers of other OSD and DoD Components that have an interest and subject matter expertise in the information under review. Coordination that is required external to OSD and DoD Components, for which direct contact between action officers cannot be effected, shall be forwarded to the DFOISR for coordination. Problems that surface and require the attention or **intervention** of the **DFOISR** shall be presented to the **DFOISR** early in the time allotted for staffing an action, so that the statutory time limits for processing an FOIA request may be met.

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3. Processing FOIA Appeals Within the OSD

a. Appeals received in the DFOISR for documents denied by the IDAs shall be returned to the IDA for reconsideration. As the appellate review process is the last step before a requester may file suit in a U.S. District Court, it is imperative that the denied information be thoroughly reviewed for **segregable** or total release under the FOIA (reference (d)) . After review, OSD Components shall obtain concurrence of their GC representative, then return all documents cleared or approved for release, and all documents, or portions thereof, recommended for continued denial. The information to be denied shall be clearly bracketed in black pencil, and the appropriate FOIA exemption and rationale indicated on the SD Form 472 accompanying the appellate package. The ASD(PA) is the OSD appellate authority, and as such shall render a final release determination.

b. Extensions shall be granted on a case-by-case basis, and may not exceed 5 working days. Request for extensions shall be made to the DFOISR at least 3 working days before the suspense date.

F. EFFECTIVE DATE

This Instruction is effective immediately.

Enclosure:
References



Pete Williams
Assistant Secretary of Defense
(Public Affairs)

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REFERENCES, cont inued

- (e) DoD 5025.1-1, "DoD Directives System Annual Index," January 1990, authorized by DoD Directive 5025.1, December 23, 1988
- (f) OSD Administrative Instruction 15, "OSD Records Management Program," September 11, 1981
- (g) DoD 5200.1-R, "Information Security Program Regulation, " June 1986, authorized by DoD Directive 5200.1, June 7, 1982